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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

FREDERICK GEORGE ROEHLER, II,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

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# PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

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## QUESTIONS PRESENTED FOR REVIEW

1. May the State's due process obligation of proving every element of an accused's guilt beyond reasonable doubt be lightened by instructing jurors that, if the accused has not explained or denied matter introduced by the prosecution, they may conclude such non-denial or non-explanation indicates "the truth of" such prosecution evidence and that inferences "unfavorable to the defendant are the more probable"?

2. When an appellate court finds that evidence the prosecution has represented as indispensable to conviction and the "linchpin" of its case is unreliable and improperly received, does due process require a showing of harmlessness beyond

reasonable doubt before a conviction thus obtained may be affirmed?

3. Does a "less rigorous administrative 'probable cause' standard" suffice to allow sheriff-coroners to seize already-autopsied bodies without establishing "traditional 'reasonable cause'" or giving notice to the next-of-kin?

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## OPINIONS BELOW

The majority and dissenting opinions of the California Court of Appeal [Appendix[1/] 1-165], appear at 167 Cal.App.3d 353 (dissent, 398), 213 Cal.Rptr. 353. Modification of opinion on denial of rehearing [A 166-167] is reported at 168 Cal.App.3d 289a.

## JURISDICTION

Judgment of the California Court of Appeal, Second District, was filed April 25, 1985, affirming conviction. The court modified its opinion and denied rehearing May 22, 1985 [A 166-167].

On August 19, 1985, the California Supreme Court denied a timely petition for review [A 187], amending its order nunc pro tunc on September 10 to reflect

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1/ Hereafter, "A".

that court's 4-3 division [A 188].

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution, Fourteenth Amendment:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Constitution, Fifth Amendment:

> ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

United States Constitution, Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The following California statutes, too lengthy to set forth verbatim here, may be found in the Appendix, as follows:

| | | |
|---|---|---|
| Code of Civil Procedure | §1822.50 | A-177 |
| | §1822.51 | A-178 |
| | §1822.52 | A-179 |
| | §1822.56 | A-180 |
| Health & Safety Code | §7100 | A-174-175 |
| | §7102 | A-176 |
| Government Code | §27491 | A-168-169 |
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## STATEMENT OF THE CASE

Petitioner and numerous members of his extended family sailed to one of California's Channel Islands on New Year's weekend, 1981 [RT[2/] 166-167]. There, he, his wife and stepson separated from their three children and other family members to take pictures at the mouth of the anchorage [RT 186-187, 4687-4691]. The small boat used for this expedition -- a dory -- capsized as petitioner and the boy grabbed for a puppy, which was jumping out [RT 4698-4702].

Petitioner was trapped under the dory, but managed to free himself after 30 to 60 seconds, finding the boy vomit-

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2/ This petition will cite the reporter's and clerk's transcripts below as "RT" and "CT", respectively. Exhibits will be cited "Ex.", sometimes also with hearing date noted.

ing and his wife leaning on the overturned boat [RT 4703-4709, 4943-4949]. He attempted to give each CPR while also trying to pull them to a large rock some distance away [RT 4705-4713, 4727]. About 90 minutes after their departure, the three were found floating in the ocean with petitioner supporting the others. They were rescued with appreciable difficulty, and the woman and boy were pronounced dead later in the afternoon; the time of death was never ascertained. [RT 302-320, 371-373, 405-408, 4717-4720].

There were no witnesses except petitioner who, convicted of two first degree murders, is sentenced to life in prison without possibility of parole [CT 2342-2344].

A. Seizure of the bodies

The Coast Guard flew the bodies to Ventura, the nearest airport, where county officials autopsied them, determining that both had died accidentally of salt water drowning, then released the remains to a mortuary selected by petitioner [RT 1188-1198, 1432-1434]. A few days later, the sheriff-coroner of adjoining Santa Barbara County decided to "reevaluate" his colleague's performance and obtained a warrant to seize the bodies from the mortuary. They were reautopsied for the homicide squad and returned for cremation (which the sheriff knew petitioner planned). None of this was revealed to petitioner. [RT 1759, 6789-6790; Ex. 1 (hearing of 8/20/81)].

The sheriff's pathologist found two 3/4 inch bruises on the wife's scalp

and two to four larger marks on the boy's [RT 1533-1534, 1591-1597]. At trial there was dispute over whether these even represented premortem injury [RT 6038-6041, 6339-6340; see A 162], but in any event no medical expert suggested either death resulted from head injury [see, Ex. J (hearing of 8/14/81)]. Eight pathologists eventually testified, most describing the marks as "negligible", "trivial", and at worst the kind of injury one might suffer standing up suddenly in a too-low attic[3/] [RT 1377, 3930, 6007, 6510, 6516-17]. In the words of one prosecution doctor, it was possible, but "not in the realm of probable", that the injuries even stunned the child [RT 4025].

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3/ This pertained only to the boy. The marks on the wife's scalp were concededly less significant [RT 1248, 5932, 6148, 6517].

Petitioner asserted repeatedly, beginning with pretrial motions, that removal of the bodies from the mortuary after there had already been a state-conducted autopsy violated "both the Fourth Amendment and the principles of common decency", and that failure to notify him also traduced Fourteenth Amendment due process [CT 998, 1524-1525, 2101-2102]. The trial judge found there was not "sufficient probable cause [for] the magistrate to suspicion [sic] reasonably that there was a criminal agency involved", but concluded sheriff-coroners need no warrants whatsoever [RT A 29].

The Court of Appeal held that sheriff-coroners <u>are</u> subject to the Fourth Amendment, but concluded there was no violation because:

> "While we agree that it did not meet the <u>traditional</u> 'reasonable cause'

> standard [the warrant] met a less rigorous administrative 'probable cause' standard. It did acquaint the magistrate with the essential facts of the situation: drownings which had occurred in Santa Barbara County. The recitation of these essential facts justified the issuance of the warrant to seize the bodies" [A 77-78, court's emphasis].

B. The Trial.

The People conceded their case was "a circumstantial evidence case, no question about it" [RT 7189; and see A 139, 163]. More unusually, it consisted entirely of an effort to prove a negative: The People devised a scenario avowedly offered (and received) for the purpose of demonstrating that the bruises on the boy's head were not sustained in a dory capsize [A 110]. This consisted of scripted films of sheriff's deputies intentionally rolling the dory over, and showing the dory dropping on a dummy's head, from which other forensic witnesses

used accelerometers and "Roth Charts" to calculate that the craft's rate of capsize might not cause such bruises [A 108]. They offered no such experimentation concerning what caused the boy to drown.

Nor was any cinematic testing at all produced concerning the wife. As to her, the People's case was restricted to the claim she was overinsured -- though she owned an identical amount of insurance on petitioner's life [RT 1153-1154] -- plus the fact she died near the same time as the boy [RT 7346-7347; CT 1534].

A prosecution criminalist undertook to discern a "pattern" in the marks on the boy's head and then used a dummy and smudged carbon paper to justify a conclusion that the only way the self-created "pattern" could be duplicated was

by forcing a head against a particular spot on the dory with intent to injure [A 43]. This, according to the prosecutor, was "critically relevant" [RT 3812], "powerful evidence" [RT 7485], and the "linchpin of this case" [RT 7292].

No witness -- prosecution or defense, expert or lay -- testified that either wife or son was a homicide victim. Conversely, of the parade of eight pathologists who opined, five agreed that the entirety of the evidence indicated the boy died by accident [RT 1226-1227, 5957, 6147-6149, 6344, 6509], one was inconclusive [RT 6620-6623], one said death did not occur as shown in the motion pictures [RT 3934-3937], and one (the sheriff's pathologist) testified that the drowning was "other than . . . of an accidental nature" [RT 1739]. A

prosecution expert revealed, without contradiction, that the wife suffered from a serious heart condition, undiscoverable before autopsy, which would impair her ability to cope with sudden immersion into ocean water [RT 3908-3909, 3961, and see RT 6307-6308, 6296].

C. The Disbelief Instruction.

At trial, petitioner described the accident (just as he had before his arrest). The prosecutor challenged his failure to explain away the hypothesis prosecution experts had drawn from the dory rollover project, and the jury was instructed, over defense objection,[4/] it could take into account any such failure to dispel prosecution theorizing

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4/ Instructions were discussed at an unreported conference [RT 7176]. This is the only instruction marked by the trial court "Defendant objects" [A 181-182].

> "as tending to indicate the truth of such evidence and as indicating that among the inferences that may reasonably be drawn therefrom those unfavorable to the defendant are the more probable" [RT 7524-7525, 7577].

The trial court refused an ameliorative instruction petitioner sought to remind the jury his testimony should not be singled out for treatment different from that of any other witness [A 184].

At the end of a week of deliberation and rereading of the instructions, the jury asked to rehear 45 minutes of defendant's "description of the Dory trip" [A 183]. An hour later, it returned the guilty verdicts [CT 1605].

Petitioner repeated his constitutional and other objections by motion for new trial [CT 2692, fn. 2] and pointed out on appeal that the instruction lessens the prosecution's burden of proof as well as violating the Fifth

Amendment.

The majority opinion held there was no constitutional violation, finding the instruction proper because the jury could have disbelieved petitioner's testimony that he did not know what happened during the 60 seconds he was trapped under the dory [A 124-128]; the dissent found the instruction prejudicially erroneous because there was no evidence that petitioner failed to explain or deny any fact within his knowledge and because, after four days of deliberation, the jury reheard the testimony on which this instruction dwelled. It found petitioner guilty in an hour thereafter [A 162-164].

D. Unreliable Evidence.

The Court of Appeal majority correctly concluded that the criminal-

ist's testimony was improperly admitted because it "in no manner, constituted reliable scientific procedure" and was subject to "other inherent difficulties" [A 115-116]. However, without any explanation of why, the majority declared that error "not sufficiently prejudicial" to warrant reversal [A 116].

The dissenting opinion, on the other hand, concluded that the jury "relied heavily on the experiment evidence in [deliberating] as demonstrated by its questions. The pattern evidence may have seemed to point strongly to defendant's guilt and was heavily relied upon by the People in argument" [A 158-159, and see A 160].

Since the People had repeatedly conceded the importance of this material during trial, petitioner did not focus on

the standard by which a reviewing court should assess harm in his appellate briefs. In his petition for review to the California Supreme Court, however, petitioner did assert that due process requires a reviewing court (1) to consider the prosecution's own view of the effect of the evidence in evaluating the "whole record" and (2) to make a more stringent analysis of the possibility of harm when the People concede the powerful effect of evidence.

## REASONS FOR GRANTING THE WRIT.

The issues presented would seem to have a strong claim to this Court's attention in any case, given the fact that the first two involve new implications of prior landmark holdings, while the third has been unanimously conceded to present "novel" questions regarding tolerable state intrusion when a death has occurred [A 46].

As a vehicle for those issues, however, this is one of an almost extinct species, or at least an endangered one: a case concentrating almost exclusively on guilt vs. innocence, rather than a search and seizure chess match. In classic mystery story fashion, the thirteen month span of this prosecution focused on the question of whether petitioner committed any crime -- or, more accurately, whether

any crime occurred. Undoubtedly, this was a major reason both state reviewing courts let the conviction stand only by the minimum permissible number of votes.

Petitioner believes that the constitutional protections invoked here are at least as pertinent to cases such as this, where guilt, and even existence of a crime are in great doubt, as in the more cynical, loophole appeals which have become so prevalent in the past generation. Indeed, it may not be amiss to suggest that an accused who is quite possibly innocent has more need for such protections, and that he is exactly the sort of person whom the makers of our Constitution had in mind.

I.

## DUE PROCESS PRECLUDES INSTRUCTING A JURY THAT PROSECUTION EVIDENCE IS TRUE AND INFERENCES ADVERSE TO A DEFENDANT ARE "THE MORE PROBABLE"

The instruction this Court disapproved in Griffin v. California, 380 U.S. 609 (1965) was virtually identical to the one given below (compare 380 U.S. at 610 with A 181-182[5/]). Griffin describes such comment on refusal to testify in such terms as "remnant of the 'inquisitorial system of criminal justice'" (380 U.S. at 614).

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5/ The version of the instruction in the majority opinion [A 117-119] incorrectly elides the words "by itself" from one sentence which, both in Griffin and here, actually reads:

> "The failure of a defendant to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt . . . " [A 181-182, emphasis added].

Petitioner submits that a judicial direction that the jury may consider prosecution evidence true and adverse inferences probable is at least as offensive to the Constitution when an accused takes the stand as when he exercises his privilege to remain silent. As a recent decision reaffirms, the Fourteenth Amendment encompasses a "bedrock, axiomatic and elementary constitutional principle" that an accused may not be convicted "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged" (Francis v. Franklin, ___ U.S. ___, 105 S.Ct. 1965, 1970 (1985), internal quotation marks deleted). That principle

> ". . . prohibits the State from using evidentiary presumptions in a jury charge that have effect of relieving the State of its burden

of persuasion beyond a reasonable doubt of every essential element of a crime" (Id.).

While this instruction presents a pervasive and recurring problem in the nation's most populous state,[6/] the specific facts of this case provide a textbook illustration of the way it operates to lighten the prosecution's burden.

Long before his arrest, and within days of his wife's and child's death, petitioner gave a straightforward account of his recollections of a boating tragedy to investigating officers, who later swore they "didn't suspect a crime so we didn't suspect a suspect" [CT 339, 350]. Nevertheless, following clandes-

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6/ See, e.g., People v. Saddler, 597 P.2d 130, 24 Cal.3d 671 (1979) and see authorities distinguished by the majority below [A 122-123].

tine reautopsies, the prosecution choreographed a purported reenactment[7] and demanded that defendant explain why the outcome of that fictional experiment differed from what actually happened. The majority below concluded that, because petitioner could not supply details of 60 seconds at the outset of a protracted ocean ordeal, it is permissible to instruct the jurors to assume "the truth of prosecution evidence".

Any judicial direction that some particular fact may indicate the truth of prosecution evidence and a ground for drawing unfavorable inferences is inherently suspect.

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7/ The rollover and related experiments were conducted by a biomechanical engineer whom California courts have since found unqualified (People v. Dellinger, 209 Cal.Rptr. 503, 163 Cal.App.3d 284, 294-295 (1984).

> "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."

Griffin v. California, supra, 380 U.S. at 614.

It is, or should be, basic to our system that the judge remain studiously neutral[8/] and almost as basic that the defendant should be treated like any other witness.

After all, the "presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice" (Estelle v. Williams, 425 U.S. 501, 503 (1976)). Thus, "one accused of crime is entitled to have his

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8/ See, Carter v. Kentucky 450 U.S. 288, 302-303, fn. 20 and accompanying text (1981).

guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody or other circumstances not adduced as proof at trial" (Taylor v. Kentucky, 436 U.S. 478, 485 (1978)).

Against this constitutional backdrop, the instruction given here is all the more shocking where, to use the dissenting justice's language,

> "If defendant's statement concerning the atmosphere of panic and confusion surrounding the capsizing of the dory were believed, it would not be reasonable to expect him to be able to explain how the dory capsized and the bruises occurred, especially since the experts themselves could not agree as to whether the bruises were premortem or postmortem" [A 162].

Therefore, this Court's intervention is necessary to clarify a simple point, but one which goes to the very heart of due process, the other side

of the Griffin coin: Disbelief of or dissatisfaction with a defendant's testimony is no more substantial evidence to support conviction than is his silence. To borrow once again from the dissent:

> "The important distinction in criminal law between proof of guilt and proof of innocence was disregarded in this case. The People must prove defendant's guilt, but defendant has no burden whatsoever to establish his innocence" [A 141].

Disbelief is not "substantive" or "affirmative" evidence to make a case for the jury or to support an inference (People v. Jiminez, 580 P.2d 672, 21 Cal.3d 595, 613 (1978); it "does not produce anything affirmative by way of proving that the defendant was guilty beyond a reasonable doubt as charged" (People v. Ballard, 32 Cal.Rptr. 233, 218 Cal.App.2d 295, 309 (1963); see also, Palmer v. Hall, 517 F.2d 705, 709 (5th

Cir. 1975); United States v. Foster, 500 F.2d 1241, 1244 (9th Cir. 1974); State v. Williams, 630 P.2d 694 (Kan. 1981); State v. Taylor, 422 S.W.2d 633 (Mo. 1968).

A closely related matter requiring clarification stems from the majority opinion's assumption that, because the last paragraph of the instruction "restates that there is no diminution of the prosecutorial duty to persuade beyond a reasonable doubt", the instruction does not shift the burden of persuasion to defendant [A 121]. It suffices to note that the instruction condemned in Griffin contained the same reminder, which this Court found inadequate to allay the harm (380 U.S. at 610). Rather, "[l]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the

infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict" (Francis v. Franklin, supra, ___ U.S. at ___, 105 S.Ct. at 1975).

II.

A CONVICTION CANNOT REST ON EVIDENCE JUDICIALLY DETERMINED TO BE UNRELIABLE ABSENT A SHOWING THAT SUCH EVIDENCE WAS HARMLESS BEYOND REASONABLE DOUBT.

The bedrock, axiomatic due process demand that criminal convictions rest upon proof beyond a reasonable doubt presupposes "that the fact finder will rationally apply that standard to the facts in evidence. A 'reasonable doubt' at a minimum, is one based upon 'reason'" (Jackson v. Virginia, 443 U.S. 307, 317 (1979)). Therefore, it is equally ele-

mentary that evidence which a reviewing court finds to be unreliable cannot suffice to support a conviction.

When a prosecutor has told the court and jury that such unreliable evidence is "really the linchpin of this case" [RT 7292], "critically relevant" [RT 3812], requisite to "successful prosecution" [CT 1595], "powerful evidence" [RT 7485], and "one of the really important facts in the case" [RT 10467], one would assume reversal of conviction to be mandatory. While it is true that relatively few errors in admitting evidence reach constitutional significance, one involving material whose impact on the result is thus described by its proponent exemplifies that status if anything can.

To be sure, the nature of this

Court's jurisdiction, not to mention the demands upon it, precludes routine second-guessing of state appellate court decisions on error's prejudicial effect. But that flows from an underlying premise that the lower judiciary will apply valid tests in performing that role, leaving this Court (and state courts with discretionary review power) to pursue supervisory oversight.

It is precisely because he accepts that premise and the resulting limits on certiorari review that petitioner urges the need for a bright-line rule for lower appellate courts to apply when prosecutors pin enormous weight on profferred evidence, both to gain its admission and then to achieve conviction. Upon finding material thus infused into the trial to be improper in terms of

probative value, rather than as the result of some admissibility rule, those courts should be required to scrutinize with special care and reverse unless the error is shown harmless beyond reasonable doubt.

Otherwise, the criminal process may turn into a charade in which prosecutors use dubious matter to sway juries in the hope of convicting, and then turn around and convince reviewing tribunals the same evidence was irrelevant to conviction, leaving it to this Court to sort out a needlessly greater number of substantial evidence questions under Jackson v. Virginia, supra.

Conversely, making explicit that unreliable evidence must be closely scrutinized would give meaning to this Court's recognition that:

> "Harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one."
>
> Chapman v. California, 386 U.S. 18, 22 (1967).

The mischief in a case where the reviewing court is divided two to one, and the state Supreme Court four to three, is vividly shown.

## III.

## COMMON DECENCY AND THE FOURTH AMENDMENT REQUIRE PROBABLE CAUSE BEFORE A SHERIFF-CORONER MAY SEIZE BODIES TO SECOND GUESS AUTOPSY FINDINGS.

The opinion below accurately describes this as a case presenting "a novel constitutional law issue concerning the parameters of permissible governmental

intrusion into the lives of citizens when a death has occurred" [A 46]. It also commendably concludes that:

-- a next-of-kin has reasonable, protected expectations of privacy concerning a decedent's body;

-- such expectation "could appropriately be asserted by the defendant" [A 167, and see A 60-61];

-- seizure of bodies by a sheriff-coroner constitutes state action [A 66];

-- this record presented no exigent circumstances to relieve the People of the need for a warrant [A 65]; and

-- the trial court correctly ruled the warrant here was issued with-

out probable cause [A 63, 77][9/].

With all that said, however, the majority went astray by concluding that mere recital that drownings occurred in Santa Barbara County justified issuing a warrant because it was "a reasonable exercise of governmental power under the United States Constitution; authorized by statute 'pursuant to an administrative plan containing specific neutral criteria'" [A 78]. That represents a serious departure from this Court's teachings, and from rationality.

Michigan v. Clifford, 464 U.S. 287, 104 S.Ct. 641 (1984), a case the

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9/ The Court may wonder whether this issue is moot since the police in fact obtained a warrant. It suffices to observe that if there is a Fourth Amendment violation, controlling California law would require suppressing the reautopsy evidence (People v. Smith, 667 P.2d 149, 34 Cal.3d 251 (1983)).

opinion below never mentions, reminds that when there are expectations of privacy which "society is prepared to recognize as reasonable", any official search and seizure must be made pursuant to a warrant in the absence of consent or exigent circumstances (104 S.Ct. at 646). By parity of reasoning with the present opinion, Clifford could have been dispatched with the observation that the searcher was an arson investigator and that a fire occurred within his county. This Court did not so rule.

Instead:

> "If the primary object of the search is to gather evidence of criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place to be searched."

Michigan v. Clifford, supra, ___ U.S. at ___, 104 S.Ct. at

647; See also, Michigan v. Tyler 436 U.S. 499, 504 (1978).

The present record affords no room for doubting that the Santa Barbara sheriff was seeking evidence of crime, not merely performing an administrative task under his other, coroner's hat. Not only had another county's coroner already taken care of investigating the drownings and found the deaths to be accidental, but:

-- The sheriff did not seek an administrative warrant from the magistrate; he requested an oral search warrant "pursuant to Mincy verses Arizona [sic]" [Ex. 1 (hearing of 8/20/81)], i.e., he explicitly invoked a decision

requiring a search warrant supported by "traditional" probable cause when homicide is suspected (Mincey v. Arizona, 437 U.S. 385 (1978);

-- The warrant says on its face it was issued "on grounds set forth in Penal Code §1524", California's search warrant provision, not under the administrative statute [Ex. 1 (hearing of 8/20/81)];

-- The autopsies were attended by the sheriff's homicide squad [RT 6789:11-6790:20].

Conversely, though California indeed has made provision for administrative "inspection warrants" (Code of Civil Procedure §1822.50, et seq. [A 177]), the sheriff-coroner did not comply with those statutes. They require a showing

"that consent to inspect has been sought and refused" and advance notice, or justification for failure to seek consent [A 178 and 180], but there is no showing that petitioner, the person entitled by California law to custody of the bodies once the Ventura medical examiner released them (Health & Safety Code §§ 7100, 7102), was ever asked for consent. Indeed, the administrative warrant concept was expressly rejected by the People, who asserted on appeal that petitioner's "reliance on cases dealing with administrative searches and similar areas is misdirected . . . Those cases dealt with areas where a party had a reasonable expectation of privacy" [A 185-186].

Curiously, in a sense the majority opinion goes too far. Petitioner never contended that coroners need search

warrants when there has been a death falling into one of the categories prescribed by California statute. Rather, his restricted point is that once an autopsy has been conducted by a county coroner -- regardless of which county gets to the body first -- and that coroner has released the body to the next of kin, the state may not thereafter seize the body to "reevaluate", or for any other purpose, without probable cause.[10/]

Thus, this Court should intervene to make clear that the rule it announced in Clifford, pertaining to arson investi-

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10/ The majority opinion suggests petitioner did not demonstrate "with sufficient particularity the potential value of a third examination of these corpses" [A 90]. In his petition for rehearing below, petitioner demonstrated the inaccuracy of that and many other of the majority's factual asseverations and conclusions.

gators, is equally applicable to coroners and to any other county officials. At the same time, it should clarify that due process requires a decedent's next-of-kin be notified when bodies are to be removed from the mortuary -- whether or not a warrant is needed -- so they can take such evidence-preserving steps as may be required under the circumstances.

## CONCLUSION

At the crux of due process is the belief that a criminal defendant has no obligation to explain anything. Thus a conviction premised on this defendant's failure to explain the prosecutor's hypotheses of how an ocean tragedy should not have happened, with those hypotheses in turn founded on heavily contradicted

evidence derived from a macabre body-snatching ploy, is truly frightening.

What makes the present case even worse, however, is the bland assumption of the majority below that unreliability of evidence deemed critical to that prosecutorial hypothesizing can be deemed "not sufficiently prejudicial" to warrant reversal in a case this close.

Certiorari should issue to establish that:

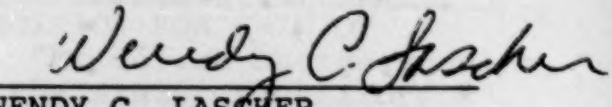
-- A criminal defendant is never obligated to explain or deny any prosecution evidence or theory and it violates due process for the judge to instruct otherwise;

-- There is no such thing as a "harmlessly erroneous linchpin" of a criminal conviction; and

-- The Fourth and Fourteenth Amend-

ments prohibit clandestine seizure and reautopsy of decedents' remains without probable cause.

Respectfully submitted,



WENDY C. LASCHER,
Attorney for Petitioner
EDWARD L. LASCHER,
Of Counsel

## PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3550 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, October 16, 1985, I served the within PETITION FOR WRIT OF CERTIORARI in re: "Frederick George Roehler, II vs. People of the State of California" in the Supreme Court of the United States, October Term, 1985, No..... and appendix thereto:

on the persons interested in said action by placing 3 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

JOHN VAN DE KAMP, Attorney General
EDWARD T. FOGEL, JR.
MARK ALAN HART
Deputy Attorneys General
Room 800
3580 Wilshire Blvd.
Los Angeles, CA 90010

THOMAS W. SNEDDON, JR., District Attorney
Santa Barbara County
118 E. Figueroa Street
Santa Barbara, CA 93101

All parties required to be served have been served.

I certify (or declare) under penalty of perjury that the foregoing is true and correct.
Executed on October 16, 1985
at Los Angeles, California.

Kathleen Kastenbach